

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAVID W. MERROW,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 15-cv-00004-RJB-JRC

REPORT AND RECOMMENDATION  
ON DEFENDANT'S MOTION TO  
DISMISS

Noting Date: March 11, 2016

This matter has been referred to United States Magistrate Judge J. Richard  
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR  
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,  
271-72 (1976). This matter is before the Court on defendant's Motion to Dismiss for lack  
of subject matter jurisdiction (*see* ECF No. 18; *see also* Declaration of Nancy Chung,  
ECF No. 18-2). Plaintiff has filed a Response (*see* ECF No. 20).

1 Although *pro se* litigants are granted some leniency when the Court interprets their  
2 pleadings, here, even when all inferences are granted in favor of plaintiff and all facts are  
3 construed in plaintiff's favor, it still is clear that plaintiff did not file his complaint in a  
4 timely fashion.

5 Therefore, defendant's Motion to Dismiss should be granted.

#### 6 BACKGROUND and PROCEDURAL HISTORY

7  
8 Plaintiff filed an application for a period of disability and disability insurance  
9 benefits pursuant to Titles II and XVI (*see* Complaint, Dkt. 4, p. 7). On July 24, 2013, the  
10 ALJ issued a written decision denying plaintiff's claim (*see id.*, pp. 3, 5; *see also* ECF  
11 No. 18, p. 2; Declaration of Nancy Chung, ECF No. 18-2, p. 3). Subsequently, the  
12 Appeals Council denied plaintiff's request for review (*id.*, at pp. 5-6; *see also* ECF No.  
13 18-2, p. 3). On October 16, 2014, the Appeals Council mailed to plaintiff notice of its  
14 denial of plaintiff's request for review and of the right to commence a civil action within  
15 60 days from the date of receipt of the notice (*see id.*; *see also* ECF No. 18-2, pp. 3, 30).  
16 As conceded by plaintiff, he filed a complaint in this Court on January 5, 2015 (*see* Dkts.  
17 1, 4; *see also* Dkt. 20, p. 21).

#### 18 STANDARD OF REVIEW

19 As noted by defendant, review by this Court "of final decisions on claims arising  
20 under the Social Security Act is provided for and limited by sections 205 (g) and (h) of  
21 said Act" (Dkt. 18, p. 2). According to the Social Security Act, a claimant may obtain  
22 review of a final decision of the Commissioner of the Social Security Administration "by  
23 a civil action commenced within sixty (60) days after the mailing to him of notice of such  
24

1 decision or within such further time as the Commissioner may allow . . . .” 42 U.S.C.  
2 §405(g). Also, “no findings of fact or decision of the Commissioner of Social Security  
3 shall be reviewed by any person, tribunal, or governmental agency except as herein  
4 provided.” 42 U.S.C. § 405(h). This 60-day limit “is a condition on the waiver of  
5 sovereign immunity and thus must be strictly construed.” *Bowen v. New York*, 476 U.S.  
6 467, 479 (1986). Pursuant to the relevant federal regulation, the date of receipt of notice  
7 of a decision by the Appeals Council is presumed to be five days after the date such  
8 notice is mailed, “unless there is a reasonable showing to the contrary.” 20 C.F.R. §  
9 422.210.  
10

#### 11 DISCUSSION

12 Plaintiff contends that he did not receive the written decision from the Appeals  
13 Council until October 28, 2014 (*see* Response, Dkt. 20, p. 2). However, even if the Court  
14 credits fully plaintiff’s contention regarding the date he received notice from the Appeals  
15 Council, plaintiff still has not filed his complaint in a timely fashion, as 60 days after  
16 October 28, 2014 is December 27, 2014, and plaintiff filed his complaint on January 5,  
17 2015. Although plaintiff alleges that he “was under the impression he had two additional  
18 weeks to respond to the denials 60 day period,” he provides no basis for this impression  
19 (*see* Dkt. 20, p. 2). Similarly, although plaintiff alleges that “somehow, he was given the  
20 option that he was given a two week extension to file his notice of complaint by civil  
21 action,” he does not inform the Court how or by whom he was given this option (*see id.*).  
22

23 Although plaintiff contends that the Court has the authority to overlook plaintiff’s  
24 failure to file his complaint in a timely fashion, plaintiff has not cited any law or

1 presented any fact which would provide this Court with such authority. Plaintiff has not  
2 alleged any fact suggesting that he was misled by the Social Security Administration or  
3 that he was not afforded due process. Plaintiff simply appears to have been under the  
4 mistaken impression that he had longer to file his complaint than he really had available  
5 to him. Therefore, the Court is unable to adjudicate plaintiff's claim on the merits.

6  
7 CONCLUSION

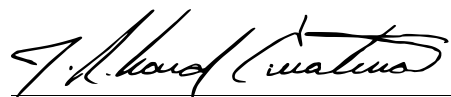
8 Plaintiff failed to file his complaint in a timely manner, and the 60-day limit "is a  
9 condition on the waiver of sovereign immunity and thus must be strictly construed."

10 *Bowen v. New York*, 476 U.S. 467, 479 (1986).

11 Therefore, the Court recommends that defendant's Motion to Dismiss be **granted**.

12 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
13 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.  
14 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
15 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).  
16 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
17 matter for consideration on March 11, 2016, as noted in the caption.

18 Dated this 18th day of February, 2016.

19  
20 

21 J. Richard Creatura  
22 United States Magistrate Judge  
23  
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